Workplace Safety and Insurance Appeals Tribunal

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Tribunal d'appel de la sécurité professionnelle et de l'assurance contre les accidents du travail

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Ontario

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Quarterly Production and Activity Report

April 1 to June 30, 2006

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Production Summary

- The active inventory totalled 5,432 (36% over the target of 4,000 cases).

- Incoming appeals numbered 1,137; of these, 1,000 were appeals from WSIB decisions and 137 appellants advised they were ready to proceed to hearing following a period of inactive status.
  - This compares to 962 new appeals and 184 reactivated appeals recorded in the first quarter of 2006.
  - In the 2nd quarter of 2005 the Tribunal recorded 1,019 new appeals and 179 re-activations.
  - In 2005, the weekly average of hearing ready appellants was 65. For Q2 2006, the weekly average of hearing ready appellants is 62. This figure excludes cases reactivated from inactive status.

- Dispositions numbered 1,131; this includes 476 dispositions in the pre-hearing areas resulting from dispute resolution (ADR) efforts and 655 after hearing dispositions; of the after hearing dispositions, 623 followed from Tribunal decisions.

- The inactive inventory increased by 39 cases to 4,348 (at the end of Q1-06, inactive inventory was 4309 cases).

- In Q2 2006, 83% of final decisions were released within 120 days. Overall in 2005, 81% of final decisions were released within 120 days.

- Due to a lack of adjudicative resources, the Appeals Tribunal remains unable to offer hearing dates within four months of the appellant confirming hearing readiness by filing a Confirmation of Appeal form. This has also led to delays in the pre-hearing areas.

The Tribunal's Notice of Appeal (NOA) process places responsibility in the hands of the parties and representatives to advance a case, and requires appellants to confirm their readiness to proceed (by filing a Confirmation of Appeal) with their appeals within two years of completing the NOA.

The NOA inventory includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" cases are currently being tracked as part of the Tribunal's case management. Many are expected to close as abandoned appeals after a two-year period expires. At the end of the second quarter of 2006, the notice inventory included 1,381 dormant cases, the active inventory totaled 5,432 cases, and the inactive inventory totaled 4,348 cases.

Production Charts

A. Active Inventory

Period	Active Inventory
Q1-2005	5156
Q2-2005	5351
Q3-2005	5378
Q4-2005	5289
Q1-2006	5321
Q2-2006	5432

B. Incoming Appeals

Period	Incoming Appeals
Q1-2005	1122
Q2-2005	1198
Q3-2005	1056
Q4-2005	1101
Q1-2006	1146
Q2-2006	1137

C. Dispositions

Period	Dispositions – total	Pre-hearing	After Hearing
Q1-2005	1136	456	680
Q2-2005	1048	416	632
Q3-2005	1016	479	537
Q4-2005	1190	465	725
Q1-2006	1147	436	711
Q2-2006	1131	476	655

D. Inactive Inventory

Period	Inactive Inventory
Q1-2005	4190
Q2-2005	4243
Q3-2005	4237
Q4-2005	4286
Q1-2006	4309
Q2-2006	4348

E. Notice of Appeal (Dormant cases)

Period	Total Dormant	Change from previous quarter
Q1-2005	1551	20
Q2-2005	1506	-45
Q3-2005	1519	13
Q4-2005	1519	0
Q1-2006	1486	-33
Q2-2006	1381	-105

The Tribunal inventory includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" cases are tracked as part of the Tribunal's case management.

Communications

In June, Ian J. Strachan, Tribunal Chair, was honoured by the Ontario Bar Association's Workers' Compensation Section to recognize his contribution and achievements in the field of workers' compensation law. Dan Revington, General Counsel, WSIAT, was program chair for the celebratory dinner program. Speakers for the evening included Wayne Samuelson, President of the Ontario Federation of Labour, David Brady of Hicks Morley Hamilton Stewart Storie LLP, Alec Farqhuar of the Ministry of Labour, and Ron Ellis, past Chair, WCAT.

During this quarter, the Tribunal held an Information Session in Timmins. The presentation was well attended by both the employer and worker communities.

In May, Dan Revington, General Counsel, co-chaired a Continuing Legal Education session through the Ontario Bar Association. The presentations, panels and break out groups for the day long event focussed on the topic of causation. The program title was "When is an Accident Really an Accident".

An issue of the Tribunal's newsletter, In Focus, was published in late June. The newsletter is posted on the Ontario Workplace Tribunals Library website, www.owtlibrary.on.ca, under the Tribunal Publications tab. The newsletter will be circulated twice per year.

Also in June, the Tribunal prepared to host an Advisory Group meeting. The Advisory Group is composed of representatives from the Tribunal's stakeholders. Topics on the agenda included adjudicator appointments and remuneration, suggested revisions to the Notice of Appeal forms and an update regarding information services.

Judicial Review Activity

The status of applications for judicial review involving the Tribunal for the second quarter of 2006 and the status of a court action are set out below. Only those judicial reviews where there was some significant activity during the quarter are listed. There are a number of other pending judicial reviews which were received after the completion of this quarter, or for which no action occurred during this particular quarter.

1. Decisions Nos. 653/99 (November 15, 1999) and 653/99R (January 21, 2002)
The Tribunal denied the worker's appeal for an increased future economic loss award and for a non-economic loss award on the grounds that the worker's medical condition was caused by non-compensable factors. The worker delayed more than three years before bringing the application for judicial review.

The application for judicial review failed to name the employer as a respondent. Counsel for the worker amended the worker's judicial review application to add the employer as a party. The employer then moved to quash the judicial review for delay. The motion was scheduled to be heard on May 9 in Ottawa, but was adjourned so counsel for the worker could cross-examine the employer's deponent on the motion affidavit. At the end of the quarter the parties were seeking to set a date for the cross-examination, and a new date for the motion and the judicial review.

2. Decisions Nos.1402/03 (January 19, 2004) and 1402/03R (August 19, 2005)

An injured worker had his benefits based upon the actual wages his employer paid him. The worker alleged that the actual wages that were paid were too low, and that under the collective agreement he should have been paid by the employer at a higher rate. The Tribunal held that it did not have the jurisdiction to interpret a collective agreement, and whether the correct wages were paid was a Labour Relations matter. The worker had not sought a remedy under the collective agreement. The Tribunal found that the amount the worker was paid was the amount to be used in the calculation of benefits, and the Tribunal did not have the jurisdiction to consider what should have been paid.

The worker commenced an application for judicial review of the Tribunal's decisions. At the end of the quarter the Tribunal was preparing its Record.

Decision No.855/03 (November 15, 2005)

The worker was a member of a union. Pursuant to the collective agreement, the employer made contributions on the worker's behalf to a benefit plan that provided health and dental care coverage, as well as pension plan coverage. The employer's contributions to the plans were based on the hours worked by the worker. Under the terms of the contract, part of the contributions were allocated to continue the worker's benefits and pension contributions for up to a year after an injury.

The worker was injured. He alleged that the employer's contribution to his benefits should be included in the calculation of his earnings for the purposes of workplace safety and insurance benefits. The Board did not include these contributions in the worker's earnings. The worker's appeal to the Tribunal was denied. The Vice-Chair noted that Board policy did not include benefit payments and pension plans in earnings basis. Further, there was no direct relationship between the employer's contributions to the plans and the benefits which the worker received under the plans. No worker could receive a refund or return of the employer's contributions to the plans. The Vice-Chair held that the Legislature did not intend to include contributions to such plans from all employers in Ontario in the earnings of workers, or to create a situation whereby some workers would receive non-taxable income.

The worker has commenced an application for judicial review. At the end of the quarter the Tribunal was preparing its record of proceedings.

3. **Kamara v Workplace Safety & Insurance Appeals Tribunal**
An injured worker's appeal was denied by a decision of a panel of the Tribunal. The worker, who is self-represented, commenced an action to sue the vice-chair of the Panel for a million dollars. The grounds for the action are not clear. At the end of the quarter the Tribunal had filed its statement of defence.

Recent Decisions

Apportionment in COPD Cases
Chronic obstructive lung disease is often due both to work exposure and smoking, a non-compensable factor. Whether permanent disability awards should be apportioned in these cases has been an issue of ongoing interest at the Tribunal. Decision No. 865/92R4, released March 14, 2006, held that there should not be apportionment.

The worker in Decision No. 865/92R4 began work in the employer's sinter plant in 1951 at age 19, had significant dust exposure for about 6 years, and first had breathing difficulties only 8 years after exposure ceased. He started smoking 3 years before his work exposure began and stopped in about 1976. The Tribunal found that both the dust exposure and the smoking were significant contributing factors to the worker's COPD.

While there is no explicit provision in the Act for reducing a worker's benefits, the pension sections in the pre-85 and pre-89 Acts require the Board to base pensions on the degree of disability actually resulting from the compensable injury. Tribunal decisions recognize that pensions may be apportioned where there is a measurable pre-existing condition or disability; there should not be apportionment, however, where there are multiple causes of a single injury. The Vice-Chair held that apportionment was not appropriate in this COPD case where there were two co-existent factors causing simultaneous and indistinguishable injury to the worker's lungs.

The decision held that there was not a section 126 issue concerning consistency with Board policy in this case because, among other reasons, Board policies either did not require apportionment on the facts, or were not applied by the Board in this case. The Board relied on its Adjudicative Advice Binder which is not policy for the purposes of s.126.

Human Rights Issues
Decision No. 2452/05I, released March 23, 2006, considered an argument that subsection 43(1)(c) of the WSIA contravened the Human Rights Code. This section provides that loss of earnings (LOE) benefits continue only until two years from the date of injury if the worker was 63 years or older at the date of injury.

The worker injured his knee in September, 1999 when he stepped into a hole at work. He did not lose time from work until August 8, 2001, when he had surgery. In 2001, his benefits ended due to subsection 43(1) (c), although his symptoms had not resolved.

The worker argued that there is a distinction between the date of accident and the date of injury. He argued that benefits should run for two years from the date of surgery. On the facts of this case, the Vice-Chair found that the injury was suffered when he stepped into the hole and twisted his knee, and the date of accident and injury were the same.

The worker submitted that the case turned on s.1 of the Code which states that every person has a right to equal treatment with respect to services, goods, and facilities without age discrimination. Services, however, is defined to exclude periodic payments. The Vice-Chair agreed with prior Tribunal decisions which held that certain types of workers' compensation payments are periodic payments and are excluded from the protection of the Code. LOE payments under s.43 are periodic payments. The worker therefore could not rely on this provision of the Code. Section 5(1) which provides a right to freedom of discrimination in the workplace because of age was also inapplicable because the claim was for benefits for the period that the worker was not at work.

Notice of Accident

Both the current WSIA and the pre-1997 WCA require claims of accidents to be filed within six months of the accident. There is a difference in the wording concerning the circumstances when this time period may be extended. Section 22 of WSIA permits a claim to be filed after the six month period "when it is just to do so". Section 22 of the pre-1997 WCA permits an extension if "the claim for compensation is a just one and ought to be allowed".

In Decision No. 2448/05, the Board denied an extension of time in a case to which the pre-1997 Act applied. The Tribunal interpreted the different wording in the Acts as meaning that under the pre-1997 Act, the Board is directed to consider the justness of the claim itself, while under the WSIA, the Board must consider the justness of the request for an extension of time. In considering the pre-1997 Act, something less than full proof of entitlement to benefits is required. There is some guidance in Board policy which stipulates that an allowable claim must have an employer, a worker, a personal work-related injury, proof of accident, and compatibility of diagnosis to accident or disablement history. The first four criteria constitute a threshold for entitlement that would trigger an investigation into whether the disability resulted from the accident. The Vice-Chair concluded that where the evidence establishes that a worker of a Schedule 1 employer has suffered an injury by accident, the claim should be considered a just one that warrants further investigation by the Board. The claim in this case met that test.

July 2006